IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 606

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,
vs.
MICHIGAN CONSOLIDATED GAS COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Michigan Consolidated Gas Company (hereinafter referred to as "Consolidated") respectfully prays that the petition for a writ of certiorari filed by Panhandle Eastern Pipe Line Company (hereinafter referred to as "Panhandle") be denied. As Panhandle itself asserts (Pet. 5)[1], the decision of the court below in reality involves two separate and distinct cases. Although Panhandle claims

[1] References to Panhandle's petition will be designated "(Pet. —)", and references to the joint appendix in the court below will be designated "(R. —)". An asterisk appearing after the record reference indicates the exhibit was not printed but is identified therein and has been filed as a part of the record. Emphasis is supplied throughout.

that each case presents significant questions requiring further review by this Court, we shall show that Panhandle's petition presents nothing more than an effort further to prolong controversies that have been in litigation for nearly a decade, that they have had the full and deliberate consideration of an appellate court uniquely qualified to decide them and that the questions present no issues which justify the further review of this Court.

Because the two controversies are distinct from one another, separate statements of the facts and questions presented will be made.

FIRST CASE

QUESTION PRESENTED

In response to an order of the Federal Power Commission directing a natural gas pipeline company to reduce its rates, that company filed a new rate schedule containing, in addition to a reduced level of rates, a provision designed to effect a substantial change in certain terms and conditions of service. After a hearing devoted solely to the question whether the proposed rates complied with the Commission's rate reduction order, the Commission entered a further order approving the newly filed rates. The Court of Appeals, in affirming the judgment of the district court, unanimously concluded that the Commission's order did not purport to include and did not in fact approve the change in terms and conditions of service and that therefore such change never became effective.

The question presented is whether this conclusion of the Court of Appeals was clearly erroneous.

STATEMENT OF FACTS

In 1935 Panhandle, an interstate natural gas pipeline company, entered into a contract with Consolidated, a utility company supplying gas to Detroit and surrounding areas, to supply the latter with its requirements of gas up to a maximum of 120,000 Mcf per day (R. 19a-59a). This contract was for firm gas as distinguished from interruptible gas and contained no terms or conditions whatever regarding the resale of the gas by Consolidated to its own customers.

In 1937 Congress enacted the Natural Gas Act, 15 U. S. C., Sec. 717 *et seq.*, authorizing the Commission to regulate the interstate transportation and sale of natural gas for resale, thus bringing Panhandle's sales to Consolidated under Commission jurisdiction. Pursuant to the requirements of Section 4(c) of the Act, Panhandle filed its contract with Consolidated and supplements thereto as an initial rate schedule.[2] Under the terms of the Act, this contract continued to govern the rights and obligations of the parties except to the extent modified by the Commission in accordance with law and the procedures specified in the Act.

In 1942, after lengthy hearings, the Commission determined that the rates charged by Panhandle to its utility customers, including Consolidated, under existing contracts were unreasonably high and ordered Panhandle to submit proposed new rates reducing its annual gross income by a specified amount (R. 1129a-1135a). The hearing and the resulting order of the Commission related

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[2] This contract was designated as Panhandle's Rate Schedule FPC No. 12.

solely to the level of Panhandle's rates and not to any other terms of the contract (R. 1129a-1135a).

After several years of litigation this Court affirmed the order of the Commission.[3] Thereafter, in response to the order, Panhandle submitted two new proposed schedules reducing its rates, one covering firm gas (Gd-1) and the other covering interruptible gas (Rd-2) (R. 61a-66a).[4] Schedule Gd-1 introduced two new elements into the rate schedule: (1) the "base load" method of fixing rates, and (2) a condition designed to effectually prohibit resale of firm gas by the purchasing utility to new customers of the utility using gas in excess of 1,200,000 therms annually (R. 61a, 62a). These two new provisions were unrelated and had entirely different purposes.

The base load method of pricing gas consisted of determining the average daily purchases of firm gas by the utility during the months of June through September. This daily average became the utility's "base load" beginning October 1 and continuing for one year. Firm gas purchased during each of the months in the yearly billing period up to the amount of the base load was billed at 1.85 cents per therm, while all gas in excess of that amount was billed at the rate of 2.6 cents per therm (R. 62a). This method of pricing was adopted by Panhandle to encourage its utility customers to make larger purchases of gas dur-

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[3] *Panhandle Eastern Pipe Line Company v. Federal Power Commission*, 324 U. S. 635.

[4] Schedule Rd-2 fixed a rate for all interruptible gas sold to a utility for resale to consumers. Panhandle undertook to sell such interruptible gas only when "in its judgment" it had "a sufficient supply of gas and adequate facilities with which to make such deliveries" (R. 66a). Consolidated made nine applications to Panhandle for such gas during November and December, 1945 but was continually refused (R. 1259a-1275a).

ing the summer months when the pipeline was not operating at capacity, thus improving its load factor (R. 1316a). By increasing its purchases during the "base load" period, the utility was of course enabled to buy more gas at the lower rate during the ensuing year.

The other new provision proposed by Panhandle was quite different. Prior to 1942, Panhandle's rates were so high as to seriously limit resales by utilities for industrial uses. When its rates were ordered reduced, and such sales became feasible, Panhandle desired to prevent its utility customers from taking on new industrial customers (R. 594), since Panhandle had by then initiated a program of by-passing the utilities and making direct sales to industries.[5] Accordingly, Panhandle included in its proposed schedule a provision that would have prevented a utility from purchasing any firm gas for resale to new large industrial consumers. This provision, as finally amended, read as follows:

> "(c) This rate schedule shall not apply to gas purchased by the Utility from the Company for resale to any individual customer whose present, or estimated, annual use of gas exceeds one million two hundred thousand (1,200,000) therms, unless such gas requirements were purchased by the Utility from the Company on a firm basis prior to October 1, 1945" (R. 61a).

Inasmuch as Schedule Gd-1 containing this provision was the only schedule proposed by Panhandle under which

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[5] Panhandle's direct sale program was condemned by this Court in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U. S. 507, 509-10, and again in *Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission*, 341 U. S. 329, where the Court said: "Appellant asserts the right to compete for the cream of the volume business without regard to the local public convenience or necessity." 341 U. S. at 334.

firm gas could be purchased, the effect of this provision was to destroy Consolidated's unquestioned contract right to sell 125,000,000 cubic feet of gas per day to such customers and under such circumstances as it chose and to give Panhandle an absolute veto on the sale of any gas to new industrial customers.

On September 14, 1945, the Commission issued an order setting hearings on Panhandle's proposed new rate schedule but specifically limited the scope of the hearing by the following provision of its order:

> "Such hearings shall be limited to matters relating to proper rates which will comply with the Commission's interim order of September 23, 1942. *The Commission reserves all other matters for later consideration*" (R. 1142a).

Panhandle introduced evidence at the hearings to support its proposed level of rates and to justify its "base load" rate proposal but introduced no evidence whatever regarding the proposed prohibition of sales by utilities to new industrial customers, since that provision involved terms and conditions of service rather than rates.

Following these hearings, the Commission issued an order on November 2, 1945 (R. 965a-975a) approving the rates in Panhandle's proposed schedules, the order expressly reciting that the preceding hearing "was limited to matters relative to proper rates." In accordance with its reservation of all other matters for later consideration, the Commission subsequently ordered a hearing regarding the terms and conditions of service in Panhandle's proposed rate schedules (R. 1114a-1146a).[6] However, be-

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[6] In that order the Commission once again stated: "The public hearing held pursuant to the Commission's order of September 14, 1945, *was not concerned with matters relating to terms and conditions of service embodied in the rate schedules under consideration,* * * *" (R. 1145a).

cause of the necessity of prescribing emergency rules and regulations dealing with shortages of gas on Panhandle's system, the subsequent hearings were confined almost entirely to that subject and resulted in orders relating solely to allocations of gas for the winter seasons of 1946-47 and 1947-48 (R. 70a-73a, 92a-99a). The result was that the Commission never entered any order with respect to such terms and conditions of service (R. 578a, 579a).

For nearly two years thereafter, Consolidated served its industrial customers with gas without any suggestion on Panhandle's part that Consolidated was violating any provision of Panhandle's tariff. However, in 1947, Panhandle claimed for the first time that its tariff provision Gd-1 Applicable (c) was effective and applicable to such sales (R. 1221a-1248a) and in July, 1948, brought the instant action claiming damages on account of the alleged violation of that provision. Panhandle's theory of damages was that, if Consolidated's purchases for sale to new industrial consumers were invalid, such purchases during the "base load" period should be excluded in calculating the base load for the ensuing yearly period (R. 9a-14a). Panhandle therefore asked judgment for the increased cost of such gas to Consolidated resulting from a recalculation of the base load with the allegedly invalid purchases excluded (R. 6a-15a, 142a, 322a).

Both the District Court and the Court of Appeals rejected Panhandle's contention that the Commission's order of November 2, 1945 had approved the provision in Panhandle's rate schedule prohibiting purchases of gas for resale to large new industrial customers (Gd-1 Applicable (c)). Both courts pointed out that the hearings preceding that order, and the order itself, were expressly limited to the propriety of the new *rates* filed by Panhandle and did not relate to the new *condition of service* that would have

prohibited sales to new industrial consumers. In this connection the Court of Appeals stated:

> "What Panhandle in effect contends is that a paragraph of a rate schedule which fixes no rates and charges but fixes terms and conditions of service, namely, Gd-1 APPLICABLE (c), is validated by an order which relates only to rates and charges. This contention cannot be sustained under the statute and applicable decisions." (Pet. App. 11a.)

Panhandle's petition for certiorari in essence asks this Court to review the decision by two courts below that the Commission's order of November 2, 1945 did not, in approving Panhandle's proposed rates, also approve a condition of service which clearly was excluded from consideration in the proceedings leading to the order and which would have destroyed a valuable existing contract right of Consolidated and prohibited the purchase by it of any firm gas for sale to new large industrial customers.

ARGUMENT

1. Panhandle's principal argument is that the decision of the courts below that the Commission's order of November 2, 1945 did not approve the condition contained in Gd-1 Applicable (c) of its proposed rate schedule constitutes a "collateral attack" on that order. (Pet. 2, 13-18). The cases said to be in conflict with the decision below all held that orders of administrative agencies may not be attacked collaterally; that direct review of an order must be sought if it is to be set aside. The courts below were perfectly aware of these principles.

It is quite a different thing to contend, however, that a court may not in subsequent proceedings construe the agency's order, if that question becomes material. Courts construe agency orders every day. It is hardly a "collateral attack" upon an order to determine that it covered one subject and not another; that it approved one part of a proposal and reserved another part for later consideration. The order is not thereby set aside or invalidated; on the contrary, it is construed and applied.

Panhandle's principal reliance seems to be on the fact that, nearly two years after the order of November 2, 1945 was issued, the Commission wrote a letter (R. 1027a-1029a) and issued an order (R. 1030a) taking the position that the prohibition of sales to new industrial customers in Panhandle's rate schedule (*i.e.*, paragraph (c)) was in effect and applicable. Panhandle apparently contends that because the Commission, two years after issuance of its order of November 2, 1945, took the position that it had there approved the condition of Panhandle's tariff prohibiting purchases for resale to new industrial customers,

the conclusion of the courts below to the contrary amounts to a collateral attack.

An agency's later statement of what it then considered an earlier order was intended to cover is a consideration to be weighed by the court in construing that order. But Panhandle's contention that the agency's *nunc pro tunc* determination is conclusive and binding upon the courts, whatever the evidence to the contrary, is startling indeed.

Panhandle makes much of the fact that Consolidated attempted to appeal the order of November 2, 1945 when the Commission two years later "interpreted" the order as having approved paragraph (c) of Panhandle's proposed rate schedule, and that the appeal was dismissed as untimely (Pet. 16). But this fact merely emphasizes the inherent fallacy of Panhandle's contention. For if an agency can issue a statement interpreting a prior order long after the appeal period has run, so that no direct appeal of the order as thus "interpreted" may be taken, and a court may not later inquire whether the Commission's subsequent interpretation is justified, the result is that judicial review is completely frustrated. Indeed, any such contention would squarely contravene the holding of the Court of Appeals for the District of Columbia dismissing Consolidated's appeal. *Michigan Consolidated Gas Co. v. Federal Power Commission,* 167 F. 2d 264. For there, in concluding that the Commission's later interpretive statement was not itself a reviewable order, the court pointed out that the meaning of the 1945 order, and whether Consolidated violated it, are questions that may properly be considered by the district court in proceedings directly involving those questions.

Thus, the issue before the courts below, and the issue that would be presented to this court if certiorari were granted, is a narrow and, in the main, factual question, namely, whether the Commission's order of November 2, 1945 approving Panhandle's proposed rates also constituted approval of its proposed condition prohibiting sales to new industrial customers. Since this is so obviously a question without general significance, the circumstances justifying the conclusion of the courts below will be only briefly stated:

(a) In its order setting a hearing on Panhandle's proposed rate schedules, the Commission specifically stated:

> "Such hearing shall be limited to matters relating to proper rates which will comply with the Commission's interim order of September 23, 1942. *The Commission reserves all other matters for later consideration*" (R. 1142a).

As the court below pointed out (Pet. App. 10a), there is a well-recognized distinction between "rates and charges", on the one hand, and "terms and conditions of service" on the other. Rates and charges are "dollars and cents" provisions. Terms and conditions of service have to do with amounts, uses, etc. Thus, when the Commission set a hearing on Panhandle's proposed rates, reserving other matters for later consideration, it was stating in plain English that conditions such as the prohibition of resales to industrial consumers were not within the scope of the proceeding.

Panhandle refers to the distinction between rates and charges and terms and conditions of service as a "hypertechnical distinction" and argues that, since the prohibition of resales to industry was a part of the *rate structure*, it must have been within the scope of the proceedings and

the Commission's order (Pet. 23). But if that were true, it is difficult to understand what matters the Commission reserved for later consideration. If the entire rate structure was encompassed by the hearings and order, the Commission's hearing order restricting the scope of the issues to "matters relating to proper rates" and reserving other matters for later consideration simply has no meaning.[7]

(b) In the order of November 2, 1945 approving Panhandle's new rates, the Commission again stated that the hearing "was limited to matters relating to proper rates which would comply with the Commission's interim order of September 23, 1942" (R. 968a). For the reasons already stated, this constitutes clear recognition that the condition prohibiting resales to industrial customers had not been considered and was not being decided.

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[7] Panhandle lays some stress on the fact that counsel for certain intervenors asked questions of Panhandle's witnesses about paragraph Gd-1 Applicable (c). (Pet. 10-11.) Panhandle fails to state that it introduced no evidence whatever in support of that provision, and that its counsel and witnesses stated categorically that the only changes in existing contracts then being proposed had to do with the rates (R. 614a, 617a, 620a, 621a, 623a) and that there were no other matters under consideration. Mr. Yost (Panhandle's counsel) at that hearing stated (R. 780a):

> "'Mr. Yost: As to the question of limitation on supply, Mr. Newton raised that point. I think that that is purely a question for consideration by the Commission when it is raised. These rate schedules preserve in effect the situation as it is and as it was. Some of these distributors have contracts which they negotiated themselves, which contained a limitation. Those contracts still prevail. Those who have no limitation are in no worse position and no better position, because of the terms of these revised schedules that are proposed here. I don't think that is even the issue in this hearing.'"

Moreover, the order for hearing defines the issues, not the sometimes irrelevant questions that may be asked. *Morgan v. United States*, 304 U. S. 1; *W. R. Grace & Co. v. Civil Aeronautics Board et al.*, 154 F. 2d 271, certiorari dismissed 332 U. S. 827.

(c) On August 6, 1946, the Commission issued an order setting a hearing on the matters reserved by the previous orders of September 14 and November 2, 1945, stating that the previous hearing "was not concerned with matters relating to terms and conditions of service embodied in the rate schedules under consideration" (R. 1145a). The "hypertechnical distinction" about which Panhandle complains (Pet. 23) was thus the distinction drawn by the Commission itself in dividing the issues for hearing and consideration. This hearing, as was stated, was started but never concluded.

(d) At the hearing just referred to, counsel for the Commission presented a "summary of special contract provisions superseded by rate filings accepted by order dated November 2, 1945" (R. 1163a). In this summary the *only* provisions in Consolidated's contract affected by the order were the rate provisions.

It was in the light of these circumstances, among others, that the courts below refused to construe the order of November 2, 1945 as having approved paragraph Gd-1 Applicable (c) in spite of the Commission's later interpretive statement (R. 1030a-1031a). The probable explanation of why the Commission took this position in 1947 is disclosed by the injunction suit filed by it in the United States District Court in Detroit in August of that year (R. 88a-91a, 1256a*). It is apparent that the Commission by that time had become exercised over a critical shortage of gas confronting Michigan during the ensuing winter due largely to Panhandle's failure to install additional equipment previously authorized and its continued direct sales to large industrial customers. To meet this condition the Commission desired the maximum amount of gas be placed in underground storage that summer so that it would be

available to supplement Panhandle's daily deliveries during the ensuing winter (R. 88a-91a, 1256a*). With this background the Commission was peculiarly receptive to Panhandle's contentions set forth in its letters (R. 1222a-1224a, 1229a-1233a, 1246a-1248a) that the resales by Consolidated to industrial customers were a violation of the schedule. No hearing was held by the Commission prior to the entry of its interpretation, the Commission purporting to act "upon consideration of data and information in the official files of the Commission", the nature of which was not disclosed (R. 1030a-1031a). To say, as Panhandle must, that such an *ex post facto* interpretation is binding upon the courts despite the language of the order and other evidence to the contrary is to make effective judicial review of administrative action impossible.

2. Panhandle also attempts to argue that the conclusion of the courts below that the Commission's order of November 2, 1945 did not contain requisite findings to support paragraph Gd-1 Applicable (c) presents a question for review by this Court. The court below held that, inasmuch as Panhandle's proposal to prohibit resales by Consolidated to new industrial consumers constituted a change in Panhandle's contract with Consolidated, the order of November 2, 1945, if it had actually approved that proposal, should have contained findings under Section 5(a) of the Act that the terms of the existing contract were unjust, unreasonable, unduly discriminatory or preferential (Pet. App. 8a). Panhandle asserts that this conclusion involves issues now before this Court in other cases* and raises important problems of administration of the Natural Gas Act.

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* Nos. 17, 31, 51 and 53, October Term, 1955, *United Gas Pipe Line Co. v. Mobile Gas Service Corp. et al.* and connected cases.

The questions Panhandle seeks to raise simply are not here. If, as the courts below concluded, the Commission's order of November 2, 1945 was not intended to and did not pass upon or approve Panhandle's proposed prohibition of resales to new consumers, there was no occasion for the Commission to make any findings with respect to that proposal. Panhandle is thus, in reality, asking this Court to decide whether certain findings must be made with respect to an issue which the courts below decided was not even covered by the order involved.

That, indeed, was the point of the court's remarks about the adequacy of the Commission's findings. The court simply pointed out that the Commission had not made the findings that would have been required had it intended to approve that provision, and that to construe the order of November 2, 1945 as contended by Panhandle would have made it void for lack of adequate findings. Since the courts below concluded that the Commission's order did not and was not intended to approve Panhandle's industrial resale proposal, however, the Commission's failure to make any findings with respect thereto was, of course, understandable and proper.

In short, Panhandle here seeks review of a holding that, if a particular issue had been decided by the Commission, certain findings would have been required, despite the fact that the courts below correctly held that that issue had not been considered or decided by the Commission in its order. Unless this Court were to reverse the conclusion of two lower courts that the order of November 2, 1945 did not approve paragraph Gd-1 Applicable (c), it would not even reach the question of what findings are necessary to support such an order.

Panhandle finally asserts (Pet. 24) that the rate schedule provided "in effect" that the base load would not include any purchases for resale to new industrial customers, and "if gas was so taken on a firm, rather than an interruptible basis, the rate would be 2.6¢ per therm." Upon this premise, Panhandle then states that paragraph Gd-1 Applicable (c) is a "rate classification."

These statements are simply erroneous on the facts. As has been pointed out, paragraph (c) attempted completely to prohibit purchases of firm gas for resale to industrial customers and did not refer or relate directly or indirectly to computation of base load rates. The Court of Appeals did not discuss the question, since it concluded that paragraph (c) was ineffective in any event. However, the district court rejected Panhandle's contention on the ground that it would in effect require establishment of an entire new category of rates never presented to or passed upon by the Commission (R. 1320a-1321a). Therefore, when Panhandle now boldly states that the rate schedule "in effect" provides for exclusion of the allegedly prohibited resales from the base load, it is asking this Court to *assume* the contrary of the district court's conclusion on this question.

Stripped of all irrelevancies and generalizations, therefore, Panhandle's petition for certiorari in the First Case simply asks this Court to construe anew an order of the Federal Power Commission in the light of the evidence in a long and complicated record, despite the fact that two courts have already completed that chore with identical results. The question at best is one of very narrow applicability. The order involved applied only to the operations of one pipe line company for a limited period of time, since the "base-load" type of rate was abandoned by Pan-

handle on February 2, 1952, when it put in effect a "demand-commodity" type of rate. The rulings of the lower courts could only constitute precedents in similar cases brought by Panhandle against other utility customers of its line. We know of no such litigation. Consequently, Panhandle here seeks review of a determination—the scope of which is confined to this particular dispute between these particular parties. The petition should be denied.

SECOND CASE

QUESTIONS PRESENTED

A contract between a natural gas company, as seller, and a utility, as buyer, required seller to deliver buyer's requirements of natural gas up to 125,000 Mcf per day and made seller liable for buyer's damages if deficiencies in deliveries were due to seller's fault. Deliveries less than those required by the contract were made under orders of the Federal Power Commission allocating seller's deliveries among its customers during certain periods when seller was unable, through lack of facilities, to make full contract deliveries to all of its customers. The questions presented are:

1. Whether the court below properly construed the allocation order as requiring the seller to deliver to buyer the full amounts that could be delivered through its existing facilities and accordingly determined that the buyer was entitled to damages from seller resulting from its failure or refusal to make full utilization of its existing facilities.

2. Whether a petitioner may raise the defense of *res judicata* for the first time in this Court after having failed to plead or argue the defense in the courts below; if so, whether a prior decision that a party cannot obtain specific performance of a contract because the relief requested was within the exclusive jurisdiction of an administrative agency bars the party's subsequent action for damages on principles of *res judicata.*

3. Whether the determination as to whether or not the seller fully utilized its existing facilities is within the exclusive jurisdiction of the Federal Power Commission and, for that reason, beyond the competence of the courts.

STATEMENT OF FACTS

Under the contract entered into between Panhandle and Consolidated in 1935 (*supra,* p. 3), Panhandle agreed to furnish Consolidated's requirements of gas up to 125,000 Mcf per day (R. 19a-59a). The contract also obligated Panhandle to operate its pipe line "in such a manner as to assure, as nearly as is reasonably possible, a continuous supply of gas in the quantity and of the quality required by this agreement" (R. 32a), and in case of deficient deliveries Panhandle was obligated to "reimburse buyer for any loss which it may sustain by reason of such failure, *including the cost of putting into operation any gas manufacturing equipment * * * to remedy such deficiency*" (R. 39a).

More than ten years after entering into this contract with Consolidated, Panhandle and Consumers Power Company organized a joint subsidiary, Michigan Gas Storage Company, which Panhandle then contracted to supply with 100,000 Mcf of gas per day, despite the fact that its com-

pressor station at Edgerton, Indiana, was inadequate to deliver this quantity of gas in addition to the requirements of its other customers east of Edgerton, including Consolidated (R. 191a-193a). The Commission approved deliveries to Michigan Gas Storage upon Panhandle's representation that it intended to construct additional facilities at Edgerton that would enable it to fulfill all of its contract commitments (R. 194a).

For some reason that does not appear of record, Panhandle never constructed the additional facilities at Edgerton but nevertheless undertook deliveries to its joint subsidiary, Michigan Gas Storage (R. 190a, 205a, 1175a-76a). As a result, by the spring of 1948 a serious gas shortage had developed among Panhandle's customers in Ohio and Michigan (R. 172a-175a, 228a). At a hearing called by the Commission to consider this situation, it developed that the maximum daily demand by Panhandle's customers east of Edgerton other than Consolidated and Michigan Gas Storage totaled 75,000 Mcf per day, and that the daily requirements of these two customers totaled about 225,000 Mcf per day (R. 190a). Panhandle claimed that the physical capacity of its Edgerton station was "from 265,000 to 270,000 Mcf per day on the average" (R. 191a), but its own evidence showed a maximum daily delivery of 296,000 Mcf and an average of 283,000 Mcf (R. 1277a-1280a).

In its Opinion No. 166, the Commission pointed out that the evidence clearly indicated a station capacity greater than 270,000 Mcf per day and specifically refused to find that this was the maximum capacity of the Edgerton station (R. 191a). It was apparent, however, that the demands of Panhandle's customers east of Edgerton were greater than the capacity of the station, and the Commission accordingly determined to allocate that capacity among

such customers. In its order of July 17, 1948 accompanying Opinion No. 166, therefore, the Commission provided:

> "(B) Until October 31, 1948, Panhandle Eastern Pipe Line Company shall make deliveries to Michigan Consolidated Gas Company at Detroit and Michigan Gas Storage Company of *such volumes of gas as may be available* after making deliveries to all of its other customers east of its Edgerton Compressor Station * * * pursuant to the provisions of the effective tariffs and contracts, as follows:
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> "Panhandle shall deliver to Michigan Consolidated 52% and to Michigan Gas Storage 48% of such available volumes of natural gas * * *" (R. 233a-234a).

The meaning of this provision had been spelled out by the Commission in its Opinion No. 166. In the proceedings culminating in that opinion and order, the Michigan Public Service Commission had asked the Commission to establish specific priorities for Consolidated and Michigan Gas Storage over Panhandle's direct sales to industries west of Edgerton under interruptible rate schedules (R. 214a, 215a). The Commission did not issue an order in those terms but pointed out that, since Consolidated's contract with Panhandle required firm deliveries, "we must assume that in the operations of its system, Panhandle will give to the deliveries thereunder the degree of priority appropriate thereto" (R. 216a).

The Commission then noted that the "dominant, if not controlling factor" governing the supply of gas east of Edgerton is the physical capacity of that compressor station but stated that, since estimates of station capacity have frequently been substantially below performance, no finding would be made as to the availability east of Edger-

ton of specific volumes of gas (R. 216a). The Commission then continued:

> "Rather we believe that Panhandle will exert every reasonable effort to deliver through that station the largest volumes of gas possible; and we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries pursuant to the provisions of effective tariffs and contracts.
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> "Therefore, although we deny the request for an order, we do, nevertheless, substantially grant the relief requested" (R. 216a-217a).

Despite the fact that in its opinion, the Commission expressly rejected Panhandle's contention that 270,000 Mcf per day was the full capacity of the Edgerton station (R. 191a, 216a). Panhandle took the position, upon entry of the order, that it had been relieved of all obligations to Consolidated except to put 270,000 Mcf of gas through the station daily and to deliver to Consolidated its specified percentage of that amount. Accordingly, Panhandle reduced the volume of its deliveries through Edgerton below the actual capacity of the station, and on some days actually fell short of 270,000 Mcf, with the result that Consolidated suffered severe shortages of gas. These shortages had to be supplied by the manufacture of gas at greatly increased cost, and Consolidated accordingly set off certain of these costs against bills rendered by Panhandle (R. 146a, 327a, 329a, 332a).

Panhandle thereupon brought suit to recover the amount of the set-offs (R. 142a-145a, 322a-324a)[9] and Consolidated

[9] This cause of action constituted Counts IV and VI of Panhandle's complaint.

filed a counter-claim for the remainder of its damages resulting from the deficiencies in Panhandle's deliveries (R. 131a-136a, 302a-306a).

In the court below Consolidated made two contentions: (1) that Panhandle was liable for deficiencies in its deliveries to Consolidated below 125,000 Mcf per day even though the Commission's order of July 17, 1948 authorized curtailment of deliveries, since Panhandle had failed to provide adequate facilities, and (2) that, in any event, Panhandle was liable for any deficiencies in deliveries resulting from its failure to deliver as much gas as its facilities permitted (Pet. App. 13a, 14a). The Court of Appeals rejected Consolidated's first contention on the ground that the Commission's order had effectively modified the maximum delivery provision of the contract (Pet. App. 14a-15a). But it held that, under the Commission's order of July 17, 1948, Panhandle's failure and refusal to deliver gas to Consolidated up to the capacity of the Edgerton station made Panhandle liable for the extra expense to Consolidated caused thereby (Pet. App. 18a). Accordingly, the court below remanded Consolidated's counterclaim and its defense of set-off to the district court for trial. Panhandle asks this Court to review that action.

ARGUMENT

1. As in the first case, the question principally raised by Panhandle is simply whether the court below properly construed and applied an order of the Federal Power Commission. It is by no means apparent why the construction of this particular order of the Commission presents a question of importance for this Court's consideration, and Panhandle certainly has not demonstrated that it has such importance. The nub of the controversy is this:

When shortages of gas occurred on Panhandle's system in Michigan and Ohio as a result of Panhandle's action in taking on its partly-owned subsidiary customer and its failure to install sufficient facilities at its compressor station at Edgerton, Indiana, the Commission issued an order directing the allocation of Panhandle's gas among its customers east of Edgerton. This order had the effect of temporarily suspending the requirement of Panhandle's contract with Consolidated calling for delivery of up to 125,000 Mcf of gas per day.

But upon entry of the order which specified a temporary reduction of Panhandle's delivery commitments because of *inadequate compressor station facilities,* Panhandle then seized upon this limited reduction of its contract obligation as an excuse to deliver *far less gas than its existing facilities permitted.* In this way, Panhandle of course had more gas available to sell to its direct industrial customers in Indiana and elsewhere west of Edgerton at prices not subject to regulation by the Federal Power Commission. This Court is fully familiar with Panhandle's direct sales program.[10] Thus, while the Edgerton station

[10] For a discussion of this program, see *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana,* 332 U. S. 507.

had at times delivered as much as 296,000 Mcf per day (R. 1277a-1280a), Panhandle reduced its deliveries far below that volume throughout the curtailment period, and on several days in October, 1948 put through the station less than 255,000 Mcf, with the result that Consolidated received far less than the contract volumes (R. 1072a-1077a).[11]

The court below held that the Commission's order of July 17, 1948 did not sanction this refusal by Panhandle to utilize its facilities fully but, on the contrary, directed Panhandle to deliver "such volumes of natural gas as may be available" to Consolidated and Michigan Gas Storage in specified percentages. In construing the order, the court of course referred to the Commission's accompanying Opinion No. 166, in which it was made clear that, by "available volumes", the Commission meant "the largest volumes of gas possible" to be delivered through the Edgerton station (R. 216a).

Panhandle claims that the Commission's statements in Opinion No. 166 are merely "precatory statements" (Pet. 36) and that, because the order of July 17 does not in so many words direct Panhandle to operate its Edgerton compressor station at full capacity, the order cannot be construed as having that meaning. Insofar as Panhandle argues that a court cannot look to an agency's opinion in construing its accompanying order, this Court's decisions are to the contrary. See *Illinois Commerce Commission v. United States*, 292 U. S. 474; *Georgia Public Service Commission v. United States*, 283 U. S. 765.

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[11] The fact that Panhandle was purposely diminishing its deliveries through Edgerton in order to make sales to industry west of Edgerton is demonstrated by the tremendous *increase* in gas put through the station on the Memorial Day weekend when such industries were shut down (R. 1279a).

Insofar as Panhandle relies on the fact that the Commission's opinion phrased the statement of Panhandle's obligation in such terms as "we shall expect that, if necessary to do so, and to the extent required, Panhandle will make appropriate curtailment of interruptible deliveries" (R. 216a), its position is likewise untenable. The *order* was affirmative and mandatory: "* * * Panhandle Eastern Pipe Line Company *shall* make deliveries to Michigan Consolidated * * * of such volumes of natural gas as may be available * * *" (R. 149a). The fact that the opinion, which explained the reason for the order, was phrased in terms of expectation is irrelevant, since the order itself was mandatory.[12]

Panhandle quotes from the Commission's Opinion No. 166-A but does not argue that it has any legal effect. Like the Commission's 1947 statements "interpreting" its order of November 2, 1945 in the First Case, Opinion No. 166-A was issued by the Commission of its own motion on the basis of information furnished by Panhandle, but without holding hearings, hearing argument or granting Consolidated an opportunity to object. Under these circumstances—and particularly the fact that the Commission purported to modify provisions of the contract not even mentioned in Opinion No. 166—the court below properly refused to consider the Commission's subsequent "interpretation" as binding.

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[12] The decisions cited by Panhandle as being in conflict are not in point. In *United States v. Atlanta, B. & C. R.*, 282 U. S. 522, and *Shannahan v. United States*, 303 U. S. 596, no order was ever entered. In *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, this Court simply held that certain findings of the Commission, not being in the form of an order, could not be reviewed under the terms of the Natural Gas Act.

Panhandle's principal contention in the Second Case is thus substantially the same as in the First Case, namely, that the court below erroneously construed an order of the Commission. The facts clearly support the court's conclusion. But more important from the point of view of this Court's exercise of its certiorari jurisdiction, the question involved has no significance whatever beyond the facts of this particular case.

2. Panhandle's claim that a prior decision of the court below is *res judicata* of the claim made by Consolidated for damages may be shortly answered.

In the first place, this contention was not so much as hinted at in the courts below. Thus, in stating (Pet. 38) that "the court below, although it cited its prior decision, failed to accord it any effect," Panhandle is being something less than candid, since it failed to raise or argue the question. Review of the issue of *res judicata* by this Court would be inappropriate for that reason alone. *McCullough v. Kammerer Corporation,* 323 U. S. 327.

Moreover *res judicata* is a defense that must be pleaded affirmatively under Rule 8(c) of the Federal Rules of Civil Procedure if it is to be relied upon. Neither Panhandle's reply to Consolidated's counter-claim nor its pleadings with reference to Count IV and VI makes any such plea, and it sought to introduce no evidence in support of that claim.

It is well established, as held in *Murrell v. Stock Growers Bank,* 74 F. 2d 827, that:

> "A party may waive his right to assert the conclusiveness or bar of a judgment under the doctrine of *res judicata.*
>
> "A former adjudication is a matter of defense in bar, and does not go to the jurisdiction. Ordinarily it must be pleaded and proved."

Since Panhandle failed to plead or prove the defense in the trial court or to argue the contention in the court of appeals, it may not properly argue *res judicata* in this Court.

Moreover, even if it were properly here, Panhandle's *res judicata* argument is without merit. The prior action to which Panhandle refers was one in which Consolidated brought suit against Panhandle for specific performance of the gas purchase contract. That action was dismissed by the district court, 80 F. Supp. 27, the decision being affirmed on appeal to the Court of Appeals for the Sixth Circuit, 173 F. 2d 784, on the ground that to order specific performance of the contract would be to invade the regulatory function of the Federal Power Commission to direct what service a natural gas company shall perform and to whom it shall make its sales. Thus, the court's decision was not that Consolidated's claims lack merit but that the injunctive relief then sought, which would have been of a regulatory nature, was within the exclusive jurisdiction of the Commission.

The present action, on the other hand, is solely for damages on account of Panhandle's failure during past periods to comply with the Commission's orders. The considerations that led the court below to dismiss Consolidated's previous action thus were not present here. There is in this case no danger that the court's order will conflict with future determinations of the Commission. Since that was the basis of the prior decision—that is, that the *remedy* was improper rather than that the *right* did not exist—the former decision clearly could not be *res judicata*.

An analogous situation was presented in *June v. George C. Peterson Co.*, 155 F. 2d 963 (C. A. 7), where the claim was made that a prior decree dismissing an injunction

action on the ground that the plaintiff had not come into court with clean hands was *res judicata* of a subsequent action by the plaintiff for damages. The court of appeals held, however, that *res judicata* was inapplicable since "the two causes of action are entirely different." There, as here, the first action was dismissed without consideration of the merits of plaintiff's claim. Clearly, a decision holding merely that a remedy is barred cannot be *res judicata* of a subsequent suit invoking a different remedy.[13]

3. Finally, Panhandle argues that the doctrine of primary jurisdiction requires prior resort to the Commission to determine the capacity of its Edgerton compressor station before damages can be allowed for failure fully to utilize its facilities. The court below fully considered this question on the basis of all the facts and concluded that it involves "the usual questions of law and fact which a court is authorized to handle and which require no special expert knowledge. The exercise of the administrative power and discretion of the Commission is in no way involved" (Pet. App. 17a).

Panhandle's contention that the Commission must first consider the matter is in the teeth of the fact that, when Consolidated sought to obtain a ruling in the trial court defining the issues the court thought should be referred to the Commission,[14] counsel for Panhandle objected to such a reference, on the grounds that a reference would unduly delay the court proceeding and that Consolidated had no right to a determination by the Commission (R. 441a-442a). And in the Court of Appeals Panhandle again

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[13] See also, *e. g., Woodbury v. Porter*, 158 F. 2d 194, 195-6 (C. A. 8); *Kelliher v. Stone & Webster*, 75 F. 2d 331 (C. A. 5).

[14] The trial court had previously ruled that certain issues were within the exclusive jurisdiction of the Commission.

stated categorically in its brief (p. 18) that "* * * it is Panhandle's position that the District Court had jurisdiction to decide the case before it *and that it would have been improper for it to have referred any part thereof to the Federal Power Commission* * * *." Now, however, having lost on the question of its obligations to Consolidated, Panhandle is arguing that a reference to the Commission would have been appropriate after all. Panhandle's argument is thus one solely of expediency, not of principle.

In essence, Panhandle's claim is that the question of the capacity of the Edgerton station is technical and complex and should therefore be tried before the agency that regulates the industry. To give color to this contention, Panhandle has gone to great lengths (Pet. 41-43) to make the question seem technically difficult and to attempt to introduce questions of future policy—despite the fact that the action is one for damages arising out of events that occurred seven years ago.[15]

Unquestionably all of the operating conditions affecting the capacity of Edgerton station on any particular day are ascertainable from Panhandle's records. Once these are determined the question reduces itself to mathematical calculations entirely familiar to gas engineers, as to whether gas which was delivered direct to certain industries west of Edgerton on that day could have been put through Edgerton and delivered to Consolidated and Michigan Gas Storage. No question of policy is involved

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[15] Panhandle's argument is that to permit the court to determine these questions would encourage pipeline companies not to cooperate with the Commission in the future in emergency situations for fear of subsequent damage suits (Pet. 43). The short answer is that if Panhandle had complied with the Commission's orders there would have been no suits.

here for the Commission long ago ruled that, for the period here involved, all available gas should be delivered to those companies. Certainly this is a question no more difficult or complex than many courts are regularly called upon to consider and determine. The court below, which had read and considered the entire record and was intimately familiar with the matter, concluded that the issues were well within the proper sphere of the district court.

The case of *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, cited by Panhandle as being "almost squarely in point," is quite a different matter. Petitioner there sought a mandatory injunction that would have effectively changed transportation practices sanctioned by the Interstate Commerce Commission for many years. This Court held that before a court could decide whether certain contracts had been violated, many complex administrative problems must be determined by the Commission, including such questions as whether a railroad must be required to construct terminal facilities. Here, on the other hand, the question is simply whether the court or the Federal Power Commission shall determine whether Panhandle fully utilized the capacity of one of its compressor stations. The facts and issues in the two cases are entirely dissimilar.[16]

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[16] *Montana-Dakota Utilities Company v. Northwestern Public Service Co.*, 341 U. S. 246, also cited by Panhandle (Pet. 46), involved the question whether a court could determine the reasonableness of the rates of a company subject to the Commission's jurisdiction. Obviously this was a mater committed entirely to the discretion of the Commission.

CONCLUSION

This case has been in litigation for nearly nine years. Panhandle has been heard and its arguments considered by two able courts. Its request for further review represents nothing more than the efforts of an unsuccessful litigant to exhaust all possible remedies. There are no questions of general importance here involved and nothing resembling a conflict of decisions.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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